Supreme Court, U.S.
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NO. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term 1999

SHARON PAULK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ of Certiorari
From The United States Court of
Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE SIXTH CIRCUIT'S APPLICATION OF FLOOD CONTROL ACT IMMUNITY TO GOVERNMENT NON-FLOOD CONTROL GROSS NEGLIGENCE MISCONSTRUES THE INTENT OF CONGRESS.

II.

WHETHER THIS COURT SHOULD REVISIT U.S. v. JAMES, 478 U.S. 597, 106 S.Ct 3116 (1986) TO PREVENT CENTRAL GOVERNMENT FROM LEGISLATIVELY IMMUNIZING ITSELF FROM LIABILITY FOR ACTS NOT RELATED TO THE PURPOSES OF THE LAW.

LIST OF PARTIES

This U.S. Tort Claim was filed by Sharon Paulk, Dyersburg, Tennessee. Stephen Paulk, a minor, deceased, was her son. He was drowned in a Wildlife Management Area under the joint management of the United States Fish and Wildlife Service and the Tennessee Valley Authority and United States of America was the Defendant.

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OPINIONS BELOW

The per curiam opinion of the Sixth Circuit was filed June 9, 1999, a copy of that opinion being filed herewith as Appendix A. The Circuit Court adopted the opinion of Honorable Jon McCalla, District Judge, whose opinion is filed as Appendix B.

JURISDICTION

The opinion of the Sixth Circuit was entered on June 9, 1999, and Supreme Court has jurisdiction to review this case per 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Flood Control Act of 1928: 33 U.S.C. § 702(c): No liability for any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.

STATEMENT OF THE CASE

Plaintiff's six year old son drowned on May 28, 1995, in the I-40 Impoundment Unit of the Tennessee National Wildlife Refuge, owned by the United States with the titled vested in the Tennessee Valley Authority. The area is managed pursuant to a joint agreement between the Fish and Wildlife Service of the U.S. Department of the Interior for wildlife management and the Tennessee Valley Authority for flood control.

The site where the drowning occurred lies almost immediately beneath the bridges of Interstate 40 as it crosses over the Tennessee River. To reach the area one can walk down a high embankment from the highway or can drive to it via an exit off the Interstate to a winding side road down through hills and hollows, past an area where some private landowners have cabins and trailers, along the edge of the water to the I-40 bridge and then under it to where the accident occurred.

A gravel levee road runs beneath and roughly parallel with the I-40 bridge. Underneath the road run two 4' culverts. On the date of the accident, the Tennessee River, which flows north, had come out of its banks and was flowing back south over the road into an impoundment area.

The deceased with his brother was wading and playing in the water on the north side of the road. He disappeared from view and was found to have been entrapped against a gate in one of the culverts on the south side of the road. It is not known whether he was swept into the pipe by the force of the water, whether he ducked down and went in or how he got in, but he drowned and rescuers were unable to revive him.

Depositions of witnesses produced confusing information about whether there was a visible vortex at the mouths of the pipes, whether the area was openly and obviously dangerous, or whether the deceased had been warned or whether the child lacked supervision. All these, however, are irrelevant to the present question.

The area where the child drowned was a public-use area created by the Fish and Wildlife Service (FWS). John Taylor, manager of the Refuge was deposed as designated representative of the government.

The Tennessee National Wildlife Refuge (TNWR) was created for wildlife management. The FWS manages the area for responsibility for Fish and Wildlife management and TVA has authority for power generation, flood control and somewhat in navigation with the Corps of Engineers.

The Refuge was created by Presidential Order as a refuge and management area for migratory birds and related recreation.

Recreation is permitted to the degree that it is compatible with wildlife management.

The impoundment area itself had been created years earlier when the State of Tennessee wanted to build a new I-40 bridge over the river and across federal land. The construction would destroy approximately 30 acres of wetlands managed by FWS. As mitigation for the 30 acres of

wetlands to be impacted by the bridge the State agreed to construct a five-acre pond, a haul road and two water control structures and pipes under that road with gates that let the water in and out of the ends of the pipes.

Mr. Taylor introduced correspondence, dated June 1, 1988, from Mark Musuas, Refuge Manager, to State of Tennessee Department of Transportation: "If the decision is made that a road is necessary and a pipe will be placed in the ditch to allow water flow, would it be possible for us to attach a water control structure (screw gate) on the pipe? Doing so would enable us to water management capability in 300 acres of habitat for migrating waterfowl on the south end of the Duck River Unit of the refuge. At a time when the Fish and Wildlife Service is actively pursuing the goals and recommendations of the North American Waterfowl Management Plan, this water control structure would be an inexpensive project that would greatly benefit waterfowl that migrate and winter along the Tennessee River."

The document along with several others indicated that the area in question was created exclusively for migratory bird refuge.

In April of 1995, Mr. Taylor had ordered that all water control devices within the Refuge be opened as part of the wildlife management plan. Raising and lowering the water level periodically aids the growth of plants and developments of habitat. The decision of whether to raise or lower the water level was made by management biologists.

Mr. Taylor produced Exhibit 4 from Waterfowl Management Handbook: Options for Water-Level Control in Developed Wetlands, which on page 4 shows the screw gate water control structure as part of habitat maintenance.

The water control structure at the scene of the drowning had been opened in April for wildlife purposes before the time of the late May flood. It had been opened a month or more because of too much water in the specific impoundment, not in reaction to the May flood.

The government filed a motion to dismiss for lack of subject matter jurisdiction or for a summary judgment, which was granted. The Sixth Circuit affirmed by opinion June 9, 1999.

REASONS FOR GRANTING THE WRIT

I.

THE SIXTH CIRCUIT'S APPLICATION OF FLOOD CONTROL ACT IMMUNITY TO NON-FLOOD CONTROL ACTS OF THE GOVERNMENT MISCONSTRUES THE LEGISLATION AND ADDS TO THE CONFUSION CREATED BY THE VARYING STANDARDS OF APPLICATION OF THE CIRCUITS.

The District Judge found:

> the primary purpose of the pipe in which Stephen Paulk drowned was to aid in managing the Wildlife Refuge (and) was built to the specifications of the Federal Wildlife Service. The pipe was used as a water control device which helped control the level of the water in the impoundment, making conditions favorable for migratory birds. The decisions of whether to raise or lower the water level were made by the management biologists.

> Although it is clear that the water control structure at issue was used for wildlife management and that the impoundment was also used for recreational purposes, the Court cannot overlook the fact that the area was not used solely for these two purposes. The refuge itself was deeded to TVA. Pursuant to an agreement between FWS and TVA, FWS manages the refuge under the authority granted by TVA. Under the agreement however, TVA retains authority to make any changes necessary or desirable in the facilities for the storage, use or distribution of the water .....as it may deem necessary to carry out its program of flood control by water storage in the reservoir and fluctuate the water levels to any height.

Petitioner at the trial court relied on Cantrell v. United States, 89 F. 3rd 268 (6th Cir. 1996), which arose out of an incident where a fisherman whose boat had malfunctioned was found and rescued by the Corps of Engineers. The boat being used to bring him back to the marina struck part of the shoreline, newly exposed due to the winter "drawdown" of the water level. The boat sank and Cantrell, who was trapped in the cabin of the boat, sustained serious injuries.

The Sixth Circuit in Cantrell adopted a practical standard: "Instead of focusing on the injury (or its location), we focus on the particular tortious act for which the plaintiff is trying to hold the government liable." In other words, what is the proximate cause of the injury.

The District Court, herein, however, found that there was no proximate cause unrelated to flood control management. But to do so, the Court had to reach outside the actual facts with a footnote in his opinion:

> Although the gate had been opened in April, for wildlife management purposes, Taylor testified that he would have opened the pipe had it not already been opened, as a result of flood control measures taken in conjunction with the TVA.

Thus, none of the acts complained of arose from flood control. Nonetheless, the District Court ruled the immunity of 33 U.S.C. § 702C applied:

> ....it cannot be disputed that the waters which caused Stephen Paulk to drown were 'floodwaters' carried

> through a federal flood control project, even if arguably the place where the accident occurred was not a flood control project.

The Court then contradicted its own footnote 7:

> The accident occurred because of a flood event, and the culvert in which Stephen Paulk drowned was open because of a flood and flood control measures. Accordingly, the government is entitled to immunity pursuant to 33 U.S.C. § 702C.

First, Plaintiff submits the Cantrell analysis of the immunity provision of the Flood Control Act is better than tests from other circuits. Second, the District failed to properly apply it in this case.

This petition presents the opportunity for the Court to review the division of standards between the Circuits as reviewed by the Cantrell court:

> Since James, many appellate courts have addressed the relationship between flood control activity and a plaintiff's injury that is necessary to allow the government to invoke the immunity provision of the Act. The Ninth Circuit has taken the simplest approach. In McCarthy v. United States, 850 F.2d 558

(1987), the Ninth Circuit held that a court has subject matter jurisdiction over a tort claim against the government only if a plaintiff's injuries are "wholly unrelated" to flood control activities. If the accident had anything to do with a flood control lake, or the management of a flood control lake, then the plaintiffs cannot sue. If faced with our case, the Ninth Circuit probably would note that Fishtrap Lake is sued for flood control and affirm the dismissal without further inquiry. See McCarthy, 850 F.2d at 562 (1988), *cert. denied,* 489 U.S. 1052, 109 S.Ct. 1312, 103 L.Ed.2d 581 (1989) (distinguishing Graci v. United States, 456 F.2d 20 (5th Cir.1971) (body of water a "navigation project" rather than a "flood control project")).

Other Circuits recognize that such a sweeping grant of immunity makes little sense in light of the text and purpose of the Act. Judge Easterbrook on the Seventh Circuit writes:

> James was so broadly written that it cannot be applied literally. The "management of a flood control project" includes building roads to reach the beaches and hiring staff to run the project. If the Corps of Engineers should allow a walrus-sized pothole to swallow tourists' cars on the way to the beach, or if a tree-trimmer's car should careen through some picnickers, these

> injuries would be "associated with" flood control. They would occur within the boundaries of the project, and but for the effort to curtail flooding the injuries would not have happened. Yet they would have nothing to do with management of flood waters, and it is hard to conceive that they are "damage from or by floods or flood waters" within the scope of § 702c.

Frymand v. United States, 901 F.2d 79, 81 (7th Cir.), *cert. denied,* 498 U.S. 920, 111 S. Ct. 295, 112 L.Ed.2d 249 (1990)("If § 702c has limits, they have to do with causation.").

In struggling to draw an appropriate line, some courts have followed the shoreline, extending immunity to the government whenever an accident occurs on flood control water. The analysis of the district court in Cox v. United States, 827 F.Supp. 378 (N.D.W.Va. 1992), is illustrative of a common attitude after Frymand (perhaps a result of the terrestrial nature of Judge Easterbrook's hypothetical torts.) In Cox, a young girl was playing on a rope swing tied to a tree near a lake used for flood control purposes in a federal park. The girl swung out on the rope, but fell and hurt herself. When she sued the government for damage, the court allowed her action because she fell just short of the water, injuring herself on the rocky shore.

The Court should grant certiorari to set a readily comprehensible standard with which to grant or deny immunity under the Flood Control Act.

II.

THIS COURT SHOULD REVISIT U.S. v. JAMES, 478 U.S. 597, 106 S.Ct 3116 (1986) TO PREVENT CENTRAL GOVERNMENT FROM LEGISLATIVELY IMMUNIZING ITSELF FROM LIABILITY FOR ACTS NOT RELATED TO THE PURPOSES TO THE LAW.

U.S. v. James, 478 U.S. 597, 106 S.Ct. 3116 (1986) was the product of a 6-3 court. The majority opinion pulls a broader blanket of immunity over acts of the government than Congress ever intended. The minority opinion should be reconsidered and adopted to better define the power of central government to grant itself immunity from liability for taking the lives of its citizens.

The Petitioner throughout has maintained the minority opinion in U.S. vs. James is the only rational application of the Flood Control Act which accomplishes the goals of that litigation and prevents a monumental abuse of citizens by a too-powerful central government.

According to the majority in James, even intentional torts would be immunized by the Flood Control Act. Its opinion turns on its own definition of damage rather than the nature of the act and paints immunity with such breadth it would cover assaults, murder, rape and other willful, deliberate acts of the government since damage can be caused by a vicious as well as merely inattentive or negligent government.

Instead of being a beacon to guide, James only further confuses and leads the Court, such as in Cantrell, into finding ways not to apply to Flood Control Act at all.

Justice Stevens wrote the minority opinion:

> .....It would be regrettable but obligatory for this Court to construe the immunity provision to bar personal injury claims if such was the intent of Congress. But when a critical term in the statute suggests a more limited construction, and when the congressional debates are not only consistent with this construction, but nowhere reveal a recognition, let alone an intention, that the immunity provision would deprive those injured by government negligence of any remedy, a narrower interpretation is more faithful to

> the objective of Congress. It defies belief -- and ascribes to the Members of Congress a perverse, even barbaric intent -- to think that they spent days debating the measure of extraconstitutional compensation they would provide riparian landowners but intended -- without a single word of dissent --to condemn the widows, orphans and injured victims of negligent operation of flood control projects to an irrational exclusion from the protection of the subsequently enacted Tort Claims Act. at 478 U.S. 618.

Not only does the majority opinion irrationally exclude victims from the Tort Claims Act, it also defies the 5th Amendment's no taking of life without due process of law. If the events of Ruby Ridge had taken place on a TVA Lake would the government agents have been absolved by immunity? If the government wanted to wiretap all users of a campground on the backwaters of Wheeler Dam, would the government be immune? What if a wildlife agent shot a boater on a TVA project?

According to the James majority, immunity would attach.

Here the minority clearly made the better call, and the time is ripe for a review of the whole issue.

CONCLUSION

The majority in James misconstrued the Flood Control Act's immunity provision and created a vehicle of government oppression. Fifteen years have passed and the Court should use this opportunity to review its own course in light of the limits on the power of central government.

This the 27 day of August, 1999.

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CERTIFICATE OF SERVICE

I, Michael W. Whitaker, Attorney at Law, hereby certify that I have this 27th day of August, 1999, mailed, via U. S. regular mail, a true and exact copy of the foregoing to Joe A. Dycus, Assistant U.S. Attorney, 800 Federal Office Building, 167 N. Mid-America Mall, Memphis, TN 38103.

Michael W. Whitaker

APPENDIX

A.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
No. 98-5812

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SHARON PAULK,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Tennessee

_____/

Before: GUY, COLE, and CLAY, Circuit Judges.

PER CURIAM. Stephen Paulk was drowned when he apparently was sucked into a culvert running between the Tennessee River and a flood water impoundment area. The area where the drowning occurred is under the joint management of the Tennessee Valley Authority (TVA) and

the United States Fish and Wildlife Service. However, title to the land is vested in TVA.

Alleging gross negligence, suit was instituted under the Federal Tort Claims Act by Stephen's mother Sharon Paulk, the plaintiff in this case. *See* 28 U.S.C. § 1346(b) and §§ 2671-2680. The government filed a Fed. R. Civ. P. 12(b)(1) motion, alleging lack of jurisdiction and seeking dismissal. The motion was based on the immunity granted to the United States by the Flood Control Act (FCA), 33 U.S.C. § 702c. The district judge granted the motion and this appeal followed.

Our review of the record and applicable law convinces us that the district judge properly dismissed this action for lack of jurisdiction. Judge McCalla wrote a detailed opinion which he carefully analyzed the applicable law. We find no jurisprudential purpose would be served by writing additionally, and we adopt the opinion of the district court.

The plaintiff does make two arguments on appeal, however, that were not addressed previously and we briefly address these contentions.

First, plaintiff argues that to the extent the trial judge relied on *United States v. James,* 478 U.S. 597 (1986), this reliance is misplaced because the dissent in *James* is better reasoned than the majority opinion. Whether we share that view or not is irrelevant since obviously we are bound by the Supreme Court decisions that have not been overruled by the Court itself or nullified by Congressional action. Since neither of these actions have occurred, *James* is still good law today.

Plaintiff's second contention is that the immunity provisions of the Flood Control Act have been repealed by implication by the subsequent passage of the FTCA. Since this issue is raised for the first time on appeal, it is not properly before us. *See Noble v. Chrysler Motors Corp., Jeep Div.,* 32 F.3d 997, 1002 (6th Cir. 1994). Although the argument is not properly before us, it is not a novel argument,

having been raised in other circuits and decided adversely to plaintiff's contention. *See, e.g. Aetna Ins. Co. v. United States,* 628 F.2d 1201, 1205 (9th Cir. 1980); *Taylor v. United States*, 590 F.2d 263, 266 n.4 (8th Cir. 1979); *Callaway v. United States,* 568 F.2d 684, 686 (10th Cir. 1978).

AFFIRMED.

APPENDIX

B.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SHARON PAULK,

Plaintiff,

v. No. 97-2277 Ml/A

UNITED STATES OF AMERICA,

Defendant.

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS

This matter is before the Court on Defendant's motion to dismiss, or in the alternative, for summary judgment, filed April 17, 1998.[1] For the reasons set forth below, Defendant's motion is GRANTED.

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[1] Defendant filed a corrected motion with supporting documents on April 21, 1998.

STANDARD FOR DISMISSAL UNDER RULE 12(b)(1)

Plaintiff filed suit against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b) and §§ 2671 through 2680, alleging that her minor son drowned as a result of Defendant's negligence.

Defendant has filed a motion to dismiss for lack of jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1), or, in the alternative, for summary judgment. Defendant contends that the court lacks jurisdiction due to the immunity provision of the Flood Control Act, 33 U.S.C. 702c, which states: "No liability of any kind shall attach to or rest upon the United States for any damages from or by floods or flood waters at any place."

As Defendant's motion constitutes a factual attack on subject matter jurisdiction, the Court may not presume the truthfulness of the complaint's factual allegations. Ohio Nat'l Life Ins. Co. v. United States, 922 F.3d 320, 325 (6th Cir. 1990). Instead, the Court has wide discretion to consider

affidavits and documents, as well as to conduct a limited evidentiary hearing, in order to determine whether the factual requirements of subject matter jurisdiction are satisfied. Id. Consideration of materials outside the pleadings does not convert a 12(b)(1) motion into a motion for summary judgment pursuant to Fed. R. Civ. P. 56.[2]

BACKGROUND

Having reviewed the materials submitted by the parties, the Court determines that the facts relevant to a determination of whether there is subject matter jurisdiction in this case are as follows:

Plaintiff's son drowned on Sunday, May 28, 1995, at or near a portion of the Tennessee National Wildlife Refuge

[2] There is an exception to this rule where the resolution of a jurisdictional question is intertwined with the merits of the case. Holt v. United States, 46 F.3d 1000, 1003. In that situation, a court must convert a motion under Rule 12(b)(1) to a motion under Rule 56. Id. The jurisdictional question is intertwined with the merits of the case only if subject matter jurisdiction is dependent on the same statute that provides the substantive claim in case. Id. Because the substantive law here is provided by the Federal Tort Claims Act, 28 U.S.C. Section 1346(b) and Sections 2671-2680, rather than the Flood Control Act, the exception does not apply. Id.

("TNWR"),[3] which is known as the I-40 Impoundment Unit. The land on which the accident occurred is owned by the United States and title is vested in the Tennessee Valley Authority ("TVA"). However, the area is managed pursuant to a joint agreement between the Fish and Wildlife Service of the United States Department of the Interior ("FWS"), for wildlife purposes, and the TVA, for flood control purposes.

In this case, the accident occurred in a culvert or pipe under a levee road near the I-40 bridge over the Tennessee River. The levee runs east to west, separating the river, which is to the north of the levee, from the impoundment, which is south of the levee. A water control structure was placed in the levee to allow the FWS to control water levels within the impoundment. The structure consists of two culverts or pipes running between the river side of the levee and the impoundment. On the south side of the levee, the impoundment side, there are two gates which can be lowered

[3] TNWR is comprised of approximately 52,000 acres in several units up and down the Tennessee River.

in front of the pipes to prevent water from entering or exiting the impoundment.

The Tennessee River flows in a northerly direction under the I-40 bridge, and is part of an impoundment known as Kentucky Lake. Kentucky Lake is formed by Kentucky Dam to the north and Pickwick Dam to the south. Where there is danger of flooding below Kentucky Dam, TVA keeps the dam from discharging water, and Kentucky Lake, and its environs, including the I-40 impoundment, are flooded and used as storage for the excess water.

In May of 1995, there had been massive flooding along the Ohio, Missouri, and Mississippi Rivers, but Kentucky Lake had water storage capacity. Therefore, at approximately 8:00 a.m. on Sunday, May 28, 1995, the U.S. Army Corps of Engineers ("the Corps") gave TVA an order to reduce water discharge at the Kentucky Dam to zero.

In April of 1995, some of the Refuge's watergates had been opened by TNWR as part of its wildlife management plan, including the gate for the pipe in which

Stephen Paulk drowned. Sometime in the week before May 28, 1995, John Taylor, Manger of TNWR, gave the order to open all of the watergates and water control devices within the refuge so that the levees would suffer less erosion damage. He gave this order based upon information he had received from TVA and other sources, because he believed that TNWR was going to be flooded based on the high water levels. Since the gates at the I-40 impoundment area had already been opened, Mr. Taylor simply ordered that the gates remain open.

On May 28, 1995, the Kentucky Lake was higher than the levees in the refuge. Accordingly, water was overflowing from the Lake onto and over the land and road on TNWR where Stephen Paulk was drowned. The pipes in which Stephen Paulk drowned were obscured from view on that date, due to the high water level. Indeed, several witnesses testified in their depositions that the water was one to two feet over the road itself.

Stephen Paulk was swimming with his brother and some other children on the north side of the levee road. He dove underwater and did not resurface. Apparently he had been forced by the water into the culvert going under the road. He was found on the south end of the western-most pipe, but could not be freed because he was hung up on something.[4] Someone got a tool and broke the lock on the screw mechanism for the gate, and he was freed. Despite extensive resuscitation efforts to revive him, Stephen was pronounced dead at the Benton County Hospital.

ANALYSIS

Defendant argues that it is immune from suit pursuant to 33 U.S.C. § 702(c), which provides: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. § 702(c) ¶ 2 cl.1. Plaintiff contends that the area

[4] There is apparently some dispute as to whether the gate had not been completely opened, and he was hung up on the gate, or whether he was stuck on some debris inside the pipe.

where Stephen Paulk drowned was not a flood control project and so the immunity provision is not applicable. Also, Plaintiff argues that the act of negligence was not the flooding of the pipes, but the failure to warn of the hidden danger created by the pipes, particularly for swimmers.

As the Supreme Court has noted with respect to 33 U.S.C. § 702c, the provision is clear on its face. United States v.James, 478 U.S. 597, 612 (1986) ("Congress rarely speaks more plainly than it has in [§ 702c].") It provides the United States with immunity from suits related to "flood" or "flood waters", meaning "all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control." Id. at 605.

James arose from two separate accidents occurring on flood control projects in Arkansas and Louisiana. 478 U.S. at 599. In Arkansas, the Corps began to release water through several underwater portals, in order to discharge water from a reservoir into a spilling basin below. Id. The

release created a fast, strong current toward the underwater discharge, and three individuals who were water-skiing nearby were pulled through the gates. Id. One individual drowned and two were injured. Id. at 600. After a bench trial, the district court found that the United States was negligent in failing to properly warn individuals of the danger. Id. Indeed, the court stated that the case went "beyond gross negligence" and "constitute[d] a classic classroom example of a death and injuries resulting from conscious governmental indifference to the safety of the public." Id. at 601 (quoting unreported district court opinion).

In Louisiana, two fishermen were pulled into a drainage structure when the Corps opened the gates to channel floodwaters from a basin into a reservoir below, creating strong current. Id. One of the fisherman survived, but the other drowned while being pulled through a 220-foot-long barrel of the drainage structure. Id. The government conceded that it was negligent in failing to post adequate warnings.

The Supreme Court held that the United States was immune from suit in both instances, after concluding that the provision granting immunity was unambiguous on its face, and the Federal Tort Claims Act left the statute unrepealed. See id. at 600-601. The Supreme Court rejected the argument that the failure to warn was unrelated to flood control: "[T]he manner in which to convey warnings, including the negligent failure to do so, is part of the 'management' of a flood control project." Id. at 609

The current case is factually similar to James, albeit not identical. As in James, the allegations against the government here is that it was negligent in failing to warn of dangers created by flood control measures to recreational users of a flood control project.

One factual distinction between this case and James is that in James the areas where the injuries occurred were clearly flood control projects, although recreational use was

allowed and even encouraged.[5] In this case, the area where the injury occurred has several purposes, although its primary purpose is as a wildlife management project, rather than flood control.[6]

Plaintiff argues that the primary purpose of the pipe in which Stephen Paulk drowned was to aid in managing the wildlife refuge. The Court agrees. It was built at the direction of, and pursuant to the specifications of, FWS. The pipe was uses as a water control device which helped control the level of the water in the impoundment, making conditions

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[5] James made clear that the fact that some recreational activities occurred at the location does not destroy immunity. Indeed, in James, the government printed brochures that promoted the recreational features of the Arkansas project and encouraged water-skiing. 478 U.S. at 600.

[6] There are several reported cases which do involve a multi-purpose project, although none in the Sixth Circuit that directly address the issue. See, e.g., Arkansan River Co. v. United States, 840 F. Supp. 1103, 1108-1110, 1113 (N.D. Miss. 1993) (collecting cases and concluding that there was genuine issue of material fact as to whether purpose of lock and dam where damage to vessel occurred was merely used as an instrument of passage for commercial river traffic, or whether it serves as a component of a flood control system). Arkansas River Co. and the cases cited therein, however, do not control the present case, as they were decided under a different analysis than that provided in Cantrell v. United States, 89 F. 3d 268, 269 (6th Cir. 1996).

favorable for migratory birds. The decisions of whether to raise or lower the water level were made by the management biologists.

Although it is clear that the water control structure at issue was used for wildlife management, and that the impoundment area was also used for recreational purposes, the Court cannot overlook the fact that the area was not used solely for these two purposes. The refuge itself, including the water control structure, was deeded to TVA. Pursuant to an agreement between FWS and TVA, FWS manages the refuge under the authority granted by TVA. Under the agreement, however, TVA retains authority to "make any changes necessary or desirable in the facilities for the storage, use, or distribution of water .... as it may deem necessary to carry out its program of flood control by water storage in the reservoir; . . . (c) the right to operate the reservoir and fluctuate the water levels thereof at any time or to any height." Moreover, several of the declarations attached to Defendant's motions indicate the flood control purposes of the water control

structures in the refuge. See Taylor Decl. at Paragraphs 6, 17017; Allsbrook Decl. at Paragraph 6

Moreover, the Sixth Circuit has made clear that neither the general purpose of the land where an injury occurs, nor the exact location of the injury, is controlling. Instead, immunity applies where "the act constituting part or all of the alleged breach of duty of care was an act undertaken to control flooding." Cantrell v. United States, 89 F. 3d 268, 269 (6th Cir. 1996)

Cantrell arose of an incident where a fisherman whose boat had malfunctioned was found and rescued by the Corp of Engineers. 89 F. 3d at 269. The boat being used to bring him back to the marina struck part of the shoreline, newly-exposed due to the winter "drawdown" of the water level. Id. at 270. The boat sand and Cantrell, who was trapped in the cabin of the boat, sustained serious injuries. Id. The district court granted the United States' motion for summary judgment, holding that the United States was immune from suit pursuant to Section 702(c).

The Sixth Circuit reviewed various tests set forth by different circuits establishing the relationship between flood control activity and a plaintiff's injury that is necessary to allow the government to invoke the immunity provision of the Act. It crafted a standard that is much more narrow than the broad immunity given in some other circuits:

> Instead of focusing on the injury (or its location), we focus on the particular tortious act for which the plaintiff is trying to hold the government liable. We believe that the proper standard of summary judgment is whether the plaintiff can recover without holding the government liable for a privileged activity.

89 F. 3d at 273-74. Applying the above standard to the facts before it, the Sixth Circuit held that immunity might not be available, and remanded.

The Cantrell court analyzed the causation question by focusing on whether the particular tortious act for which the plaintiff was trying to hold the government liable was a direct result of, or challenge to, the government's decisions about how to maintain flood control waters. Id. at 273-275.

Therefore, Cantrell determines whether there is immunity based on the principle of proximate cause. That is, was the proximate cause of the injury a result of flood control activities? If so, immunity attaches under 702c.

Although Cantrell states the Sixth Circuit law in this area, and is helpful in that sense, it is not factually analogous to the present case. In Cantrell, it was fairly obvious that there could have been negligence unrelated to flood control activity. The plaintiff sought relief solely on the theory that the driver of the boat was negligent. The Court made clear that had plaintiff's injuries been caused by the dangerous level of the lake's water or by any negligence associated with operating the lake, then he could not have recovered and summary judgment would have been proper.

In this case, by contrast, there is no obvious cause that is unconnected from flood management. As required by Cantrell, the Court must determine whether Plaintiff may hold the government liable without challenging its flood management activities. The Court must ask whether flood

control activities were the proximate cause of the death of Stephen Paulk.

Under Tennessee law,

> [t]he proximate cause of an injury generally is that act or omission which immediately causes or fails to prevent the injury or an act or omission occurring or concurring with another which, but for that act or omission, the injury would not have occurred. An the proximate cause is not necessarily that which is next or last in time or place, but that which is a procuring, efficient, and predominant cause.

Solomon v. Hall, 767 S.W. 2d 158, 161 (Tenn. Ct. App. 1988) (citation omitted).

The proximate cause of the injury in this case was the decision to open the gates, without placing warning signs, thereby creating a hidden hazard. That decision was made in an effort to control flood waters at a flood control project. It is undisputed that Taylor, sometime in the week prior to May 28, 1995, after continuing conversations with the TVA, gave

an order to open the gates to flood the refuge.[7] He did so in an attempt to minimize damage to the project and to control floodwaters. This action was made necessary by the backup of waters in the Kentucky Dam, which was directed by the Corps to reduce its discharge to zero in order to control flooding in areas south of the Dam. That decision, too, constituted flood control management.

Moreover, it cannot be disputed that the waters which caused Stephen Paulk to drown were "floodwaters" carried through a federal flood control project, even if arguably the place where the accident occurred was not a flood control project. The accident happened during a flood event, and the culvert in which Stephen Paulk drowned was open because of the flood and as a result of flood control measures. Accordingly, the government is entitled to immunity pursuant to 33 U.S.C. § 702c.

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[7] Although the gate was opened at first in April, for wildlife management purposes, Taylor testified that he would have opened the pipe had it not already been opened, as a result of flood control measures taken in conjunction with the TVA.

The Court is aware that the result in this case seems unduly harsh. Plaintiff has suffered immeasurable damages, and this tragedy may have been caused by some negligence on the part of Defendant. It may also be that 33 U.S.C. § 702c is unjust and should be changed. However, any such changes must be made by Congress. The Supreme Court's opinion in James over eleven years ago made that clear, yet Congress has failed to alter the provision in any way. See James, 478 U.S. at 612 ("If [the immunity] provision is to be changed, it should be by Congress and not by this Court."); See also Hiersche v. United States, 503 U.S. 923, 926 (opinion denying certiorari) ("The [immunity provision of the Flood Control Act] is an anachronism. It was enacted 18 years before the Federal Tort Claims Act, 28 U.S.C. § 2671 et. seq. waived the Federal Government's sovereign immunity from liability for personal injuries. At the time of its enactment, no consideration was given to the power generation, recreational, and conservation purposes of flood-control projects, or to their possible impact on the then

nonexistent federal liability for personal injury and death caused by the negligent operation of such projects. Today this obsolete legislative remnant is nothing more than an engine of injustice. Congress, not this Court, has the primary duty to confront the question whether any part of this harsh immunity doctrine should be retained.")

CONCLUSION

For the reasons set forth above, Defendant's motion for dismissal is GRANTED. This matter is hereby DISMISSED WITH PREJUDICE.

IT IS SO ORDERED this 21st day of May 1998.

JON P. McCALLA
UNITED STATES DISTRICT JUDGE